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THE NATURE OF TAX EXEMPTIONS.

The Supreme Court of the United States has recently decided¹ that an exemption during a stated term from taxation given for certain land allotted to Indians, who at the time of receiving such land surrendered all rights to tribal lands, may not be repealed by subsequent legislation. The right of exemption which was to continue for twenty years was granted only to the original allottees. The Act of Congress containing the grant was passed in 1898. The lands affected by it were situated in what afterwards became the State of Oklahoma which was admitted into the Union in 1907. In 1908 Congress passed another act removing restrictions upon alienation of the land affected by the Act of 1898. One section of this Act of 1908 also provided that lands from which such restrictions were removed should be subject to taxation.

Unless we assume that Congress had, under the doctrine laid down in *Matter of Heff*,² no power over these lands after Oklahoma had become a state, we must conclude, as would appear from the opinion in the case, that the sole ground of the invalidity of the act of 1908 was to be found in the fact that contrary to the Fifth Amendment it deprived persons of their property without due process of law. If this is a correct interpretation of the decision it would seem to be the view of the Supreme Court that a statutory right of exemption from taxation which is based on a consideration and which has been granted for land only during the period of ownership of the person owning the land at the time of the grant, is property which is protected against action by the United States government by the Fifth Amendment and against action by a state government by the Fourteenth Amendment. This conception of the nature of a tax exemption, imposes such a new limitation upon the powers of government, particularly those of Congress, as to justify a re-examination of the decisions of the Supreme Court with regard to tax exemptions.

In the early history of our constitutional law when the question of the nature of tax exemptions was first brought before the Supreme Court the United States government was forbidden by the Fifth Amendment to deprive any one of property without due process of law, but no such limitation was imposed by the United

¹Choate v. Trapp (1912) 224 U. S. 665.

²(1905) 197 U. S. 488, 504.

States Constitution upon the states. The states were, it is true, forbidden by that instrument to pass any law impairing the obligation of contracts but it was not until 1868 that the Fourteenth Amendment imposed upon them the same limitation with regard to the taking of property which had from the beginning existed in the case of the United States government.

The first case which came before the Supreme Court with regard to an exemption from taxation granted by a state law was *New Jersey v. Wilson*,³ decided in 1812. In this case certain Indians had prior to the adoption of the Constitution of the United States entered into an agreement with the colony of New Jersey. This agreement provided that the Indians should release all of their claims to certain lands and were to receive therefor certain other lands which should "not hereafter be subject to taxation." These lands were subsequently sold by the Indians with the approval of the then State of New Jersey which attempted to impose a tax on such lands in the hands of the Indians' grantees. The court held that the agreement made by the Indians with New Jersey, being based on a consideration was a contract; that the privilege of exemption from taxation contained therein

"though for the benefit of the Indians, is annexed by the terms which create it, to the land itself, not to their persons;"

and that the act of the state legislature which attempted to tax the lands in question was a violation of the contract clause of the Constitution and was therefore void.

The next case of an exemption from taxation that came before the court was *Armstrong v. Athens County*,⁴ decided in 1842. The State of Ohio had granted in 1804 certain lands to Ohio University which was incorporated in the act and had provided that such lands should "forever be exempted from all state taxes." The act of 1804 in another section had authorized the University to lease the land at a certain rent but also had provided

"that the said corporation shall have power to demand a further yearly rent on said lands and tenements, not exceeding the amount of tax imposed on property of like description by the state; which rents shall be paid at such time and place, to such person, and collected in such manner as the corporation shall direct."

In 1826 the legislature authorized the University to sell the lands not encumbered with outstanding leases. Pursuant to this statute

³7 Cranch 164, 167.

⁴16 Peters 281, 287.

the complainants in the case took title but no exemption from taxation was contained in the statute of 1826 nor in their deed. The court held valid the subsequent attempt by Ohio to tax these lands in the hands of the purchasers on the ground that they were strangers to the act of 1804, and that the exemption did not attach to the land.

It will be noticed that this case holds the exemption to be personal to the original holder of it and not to run with the land notwithstanding the comprehensive statement in the act of 1804 which granted it. This being the case it was unnecessary for the court to consider the question whether a consideration existed, and it is to be noticed that there was no consideration unless it was to be found in the corporate charter of the University granted by the act of 1804.

The next case coming before the court was *Gordon v. The Appeal Tax Court*,⁵ decided in 1845. There is nothing remarkable about this case. It differs from the others mainly in the fact that the kind of property held to be exempted from taxation was a bank franchise and not land. All the elements of a contract were present. There was an agreement made between the state and a banking corporation already in existence, and a consideration which had been complied with by the bank and accepted by the state for the exemption granted. The court accordingly held that the attempt of the state to repeal the exemption was void as impairing the obligation of a contract. Up to 1845 then, the rule adopted by the Supreme Court was that the state could make with persons already in existence a contract of exemption from taxation which it would not be permitted to violate. But it is left somewhat uncertain in the case of permanent immovable tangible property, like land, under what conditions the exemption is to be regarded as personal to the original grantee and under what conditions it is to be regarded as attaching to the land in the hands of a purchaser from the original grantee.

The next contribution of the Supreme Court to the law of tax exemptions was made with regard to the character of the consideration necessary as an element in any contract of exemption. This was made in *The Piqua Branch of the State Bank of Ohio v. Knoop*,⁶ decided in 1853. In this case, it was held on the authority of the *Dartmouth College Case* that the act incorporating a corpo-

⁵3 How. 133.

⁶16 How. 369.

ration, acted upon by the corporation, was sufficient consideration upon which to base a contract of exemption from taxation contained therein.

It was only, however, in 1860 that the Supreme Court determined what was the nature of a naked exemption from taxation granted to a corporation already in existence at the time of the grant and not based upon a consideration. In that year it was held that an act of a state legislature providing

"that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the City of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes"

did not constitute a contract of exemption.⁷ The court says that "this concession of the Legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia* * * * it exists *bene placitum*, and may be revoked at the pleasure of the sovereign."

This is the present rule of the Supreme Court.⁸

The doctrine that a state law granting an exemption from taxation in return for a consideration constituted a contract whose obligation might not be impaired by subsequent state legislation was thus so firmly fixed in our constitutional law prior to the adoption of the Fourteenth Amendment, forbidding a state to deprive a person of his property without due process of law, that it is not surprising that little if any effort has been made to bring tax exemptions under the protection of that Amendment. A search of the decisions of the United States Supreme Court has revealed but one, holding that the repeal by a state of a tax exemption is a taking of property without due process of law, contrary to the Fourteenth Amendment.

This is the case of *Duluth & Iron Range Railroad Company v. St. Louis County*,⁹ decided in 1900. Neither the opinion nor the decision in this case can be understood unless we read in connection with it the case of *Stearns v. Minnesota*,¹⁰ decided in the same year. In the latter case the United States had granted to the State of Minnesota certain lands to be used in aiding the construction of a

⁷Rector etc. of Christ Church v. County of Philadelphia 24 How. 300, 301, 302.

⁸Grand Lodge v. New Orleans (1897) 166 U. S. 143.

⁹179 U. S. 302.

¹⁰*Ibid.* 223, 259, 263.

railway company. At the time the grant was received the Constitution of the State prohibited the exemption from taxation of property except in certain specified cases. The State granted to certain railway corporations the land it had received from the United States and provided in a series of laws, which by their terms had to be and, as a matter of fact, were accepted by the railway companies, that those companies were to pay a gross receipts tax of three per cent. in lieu of taxation on their property. In 1871 a constitutional amendment was adopted which provided that any law repealing or amending any past or future law taxing any railroad company on its gross receipts in lieu of taxation on its property, should before it should take effect be submitted to the people of the state and be ratified by a majority of the voters.

This amendment was regarded as removing any doubt as to the constitutionality of the action of the legislature in providing for the payment by the railway of a gross receipts tax in lieu of taxation on its property but as permitting the State to modify any such arrangement in the way provided by the Amendment of 1871. The earlier cases decided in the Supreme Court of Minnesota regarded the action of the legislature in providing a gross receipts tax in lieu of property taxation, as a commutation of, rather than an exemption from taxation and as therefore not forbidden by the state constitution even prior to the Amendment of 1871. In 1896, however, the legislature with the approval of the people as provided in the amendment of 1871 amended the law imposing upon railroads a gross receipts tax in lieu of property taxation in such a way as to subject the railroads to a property tax as well as a gross receipts tax. This action was claimed by the railway company to impair the obligation of a contract and the Supreme Court of Minnesota held that there was no contract of exemption from property taxation since the legislature did not prior to 1871 have the constitutional right to exempt and subsequent to 1871 had the right to grant only exemptions which were subject to repeal and amendment.

On appeal to the Supreme Court of the United States the action of the State taken in 1896 in subjecting the property of the railways to taxation was declared unconstitutional. The majority of the court, the opinion being delivered by Mr. Justice Brewer, took the view that the action of the state in providing for a gross receipts tax in lieu of property taxation was, largely because of the views originally expressed by the Supreme Court of Minnesota, a com-

mutation of, rather than an exemption from taxation; that the Court of Minnesota should not be permitted to change its views so as retroactively to affect private rights; that the original action of the State of Minnesota in commuting the taxes was constitutional; and that finally the act of 1896 was unconstitutional as impairing the obligation of the contract commuting the taxes.

Mr. Justice, now Chief Justice White expressed the opinion of the minority. While concurring in the judgment they thought that the original action of the state in providing a gross receipts tax in lieu of property taxes was an exemption and not a commutation of taxes and was therefore unconstitutional; that the Court of Minnesota might change its views since its first decisions were made subsequent to the grant by the state to the railways which had not relied on the interpretation of the constitution made by the state court when they accepted the gross receipts tax; that the amendment of 1871 ratified the original action of the state; but that while this ratification was made on the condition that the gross receipts tax law might be repealed or amended, still the

“reserved right to repeal, alter or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guarantee against the taking of property without due process of law.”

Mr. Justice White considered that the ratified agreement imposed on the parties to it reciprocal obligations and that the attempt of the state by the act of 1896 to continue the gross receipts tax without modification while denying any obligation of the state to continue the exemption from property taxation was an act of arbitrary power which had for its effect to deny the railway company the equal protection of the laws.

“It would be a denial of due process of law to the corporation since it would be but the recognition of the right of the State, without hearing and without process of any kind, to condemn the corporation to the performance of a duty alleged to be resting on it, and at the same time retain in favor of the State as against the corporation an obligation wholly at variance and in absolute conflict with the supposed duty arbitrarily declared by the amendatory act to rest upon the corporation.”

It may not be said of this case that it holds that a right of property to exemption from taxation is a property right; first, because the majority of the court held that there was no exemption but rather a commutation of taxation; and second, because even in

the opinion of the minority the view is taken that the act of 1896 denied the railway company the equal protection of the laws rather than deprived it of its property without due process of law.

In the other case, *Duluth and Iron Range Railroad Company v. St. Louis County*,¹¹ the only opinion which was delivered was written by Mr. Justice White. Four other members of the court "concurred in the result." These members were Mr. Justice Brewer, who delivered the opinion of the majority in *Stearns v. Minnesota* and Mr. Chief Justice Fuller, Mr. Justice Shiras and Mr. Justice Peckham, none of whom is mentioned as concurring with Mr. Justice White in his opinion in that case. What were the views of the other four Justices is not stated. Inasmuch, however, as they did not dissent from Mr. Justice White's views they must be presumed to have accepted them. Mr. Justice White's opinion must, therefore, be regarded as the opinion of the court.

In the *Duluth etc. Railroad Case* the facts were slightly different from those in *Stearns v. Minnesota*. The act granting the lands to the railroad company provided for their exemption from taxation until the expiration of five years from the issuance of the patent by the state. When that was issued is not stated, but as there was nothing in the nature of a commutation of taxes this grant of exemption was clearly unconstitutional. In 1873, subsequent thus to the constitutional amendment of 1871, a law was passed applicable to all railroads accepting it, which permitted them, to quote the opinion,

"to discharge the tax on all their property real and personal by the payment of a gross receipts tax."

The law said that the property of the company was as the result of the payment of the gross receipts tax

"to be forever exempt from all taxation and from all assessment," but itself was by the terms of the amendment of 1871 subject to repeal and amendment. The court recognized that the law of 1873 "did not give rise to an irrevocable contract protected from impairment by the contract clause of the constitution of the United States," but held that to treat the amending act of 1896 which was the same as in *Stearns v. Minnesota*

"as a repeal, alteration or amendment of the contract would be to preserve all the obligations of the corporation in favor of the state, and to take away from the corporation the consideration on the

¹¹*Supra*.

part of the state upon which the duty of the corporation to pay the gross receipts tax rested. For this reason, we conclude that the act which it is asserted repealed or amended the contract was void, because a mere arbitrary exercise of power giving rise, if enforced, not only to a denial of the equal protection of the laws but to a deprivation of property without due process of law. The reasons by which we are led to this conclusion were fully expressed in the concurring opinion of four members of the court [Mr. Justice White, Mr. Justice Harlan, Mr. Justice Gray, and Mr. Justice McKenna] in *Stearns v. Minnesota*, and need not be here repeated."

The court thus decided that a repealable exemption from taxation given by the state in return for a consideration of benefit to it, *i. e.*, the payment of a gross receipts tax, could not be repealed while the state retained the benefits of the consideration and that the attempt of the state to repeal the exemption while thus retaining the benefits of the consideration was a taking of property without due process of law. The court decided this notwithstanding the fact that the thing which the railroad company agreed to do by accepting the act of 1873, *i. e.*, to pay a gross receipts tax, was a thing which the state through the exercise of its sovereign power of taxation might have compelled the company to do even if the company had not received the exemption of its property from taxation, which was coupled with the duty to pay the gross receipts tax; and notwithstanding that the court itself recognized that the so called agreement under the act of 1873 was clearly made repealable by the constitutional amendment of 1871.

While Congress is not forbidden by the Constitution to pass a law impairing the obligation of a contract it is forbidden to deprive a person of his property without due process of law. No case prior to *Choate v. Trapp* has, however, intimated that a repeal of a tax exemption is a taking of property without due process of law contrary to the Fifth Amendment. The only case discovered other than *Choate v. Trapp* which has even considered the power of Congress to repeal a tax exemption is *Welch v. Cook*,¹² decided in 1878. This case held proper an act of Congress repealing an exemption from taxation based on previous legislation. It is, of course, true that this exemption can hardly be regarded as based on a consideration. At the same time it is rather remarkable that the case would appear to have been decided on the theory that Congress may not repeal a contract of exemption from taxation

¹²97 U. S. 541.

contained in a statute. The court says of the original legislation granting the exemption that

"it does not create a contract in the sense that it cannot be repealed."

But there is no hint in the opinion of any idea that a privilege of exemption is a property right protected by the Fifth Amendment. This is the more noticeable since the exemption was accorded not to persons but to

"all property, real and personal, which may hereafter be actually employed within the limits of the District of Columbia for manufacturing purposes."

Apart from the rather unsatisfactory decision in *Duluth and Iron Range Railroad Company v. St. Louis County*, we are, therefore, not aided in our consideration of the question whether a contract for exemption from taxation is property under the Fifth and Fourteenth Amendments, by the decisions of the Supreme Court except in so far as they decide whether such a contract is a purely personal one or is attached to the property affected irrespective of its ownership. Most of the cases which have been decided in this connection have come up as the result either of the consolidation of corporations, one or both of which enjoyed a privilege of exemption, or because of the sale of the property and franchises of a corporation having an exemption to a corporation not so favored.

The first case which gave serious consideration to this question was *Morgan v. Louisiana*,¹³ decided in 1876. In this case the State of Louisiana had by an act incorporating a railway company provided that

"the works, fixtures, workshops, warehouses, vehicles of transportation and other appurtenances of the company, should be exempt from taxation for ten years after the completion of the road within the limits of the State."

Subsequently and before the completion of the road, a mortgage was issued

"on the portion of the road completed, together with the land over which the road was constructed, the equipments, appurtenances, rights, and franchises of the company applicable to that portion."

The defendant in error, Morgan, became the owner of several hundreds of the mortgage bonds issued; and, the interest not being paid, instituted suit for the sale of the mortgaged property. A sale was had and

¹³93 U. S. 217, 220, 221.

"the defendant became the purchaser of the completed division of the road, and the equipments and franchises appertaining to that division, with its cars, locomotives, machinery, utensils and effects generally."

The State of Louisiana subsequently attempted to tax this property in the hands of the defendant. The Supreme Court of Louisiana took the view that the exemption granted to the original corporation was a personal right and did not follow the property of that corporation into the hands of third parties. The decision of the state court was affirmed by the Supreme Court of the United States which said:

"It can hardly be supposed that the legislature intended that the exemption should follow the fixtures and vehicles of the company after they had passed out of its control, so that, wherever found, the power of taxation could not touch them; or, that workshops and warehouses ceasing to be the property of the company should carry to its subsequent possessors a privilege intended only for the benefit of the corporation."

The decision in *Morgan v. Louisiana* has never been reversed. The court has consistently adhered to the view that an exemption from taxation is not a part of the property of the corporation possessing it, and is not transferable to such corporation's successor except where such transfer is clearly provided by law. The court has even held that a judicial sale of the property of a corporation under a law providing that such sale

"shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it"

does not give to the purchaser any exemption from taxation possessed by the corporation whose property is sold. This decision was reached notwithstanding the fact that the law providing for the sale said that

"the corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges and perform all such duties as would have been had, or should have been performed by the first company, but for such sale and conveyance."

The court said in answer to the contention that this clause of the law had the effect of conveying to the purchaser the right of exemption from taxation possessed by the original corporation:

"But broad, general and comprehensive as the language is, we cannot, in reference to the subject-matter now in hand, apply it with that force and meaning. * * * There is no express reference to a grant of any exemption or immunity; nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption."

This case has been selected as perhaps the strongest case which supports the view that a right of exemption of taxation is not by the sale of the property of a corporation transferred to its successor. For the act of the state legislature which provided for the conveyance of the railway property specifically provided that

"upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance. * * *

"The corporation created by or in consequence of such sale and conveyance shall succeed to"

all the franchises of the first company. The law thus clearly intended the new corporation to be the successor of the first corporation, but notwithstanding this fact it was not permitted to succeed to the right of exemption from taxation possessed by the old corporation either as property or as a franchise.¹⁴

Prior to the decision of the *Chesapeake and Ohio Case* the court had held that when no such provision had been made by law for a successor to the old corporation which was still permitted to remain in existence, the right of exemption from taxation did not pass to a new corporation under a sale or foreclosure of a "mortgage of its charter and works."¹⁵ In the earlier case of *Railroad Company v. County of Hamblen*,¹⁶ decided in 1880, it was also held that a sale of "all the property and franchises" of a railway company did not transfer to the purchaser the right of exemption from taxation notwithstanding the fact that the purchaser said in the proposal which was accepted by the commissioners entrusted by the court with the sale:

"I expect a full and perfect title to the road including the State's interest, franchises and privileges."

The court took the view it expressed because this proposal while accepted by the commissioners was so confirmed by the court order-

¹⁴*Chesapeake and Ohio Railway Co. v. Miller* (1885) 114 U. S. 176, 181, 185.

¹⁵*Memphis Railroad Co. v. Commissioners* (1884) 112 U. S. 609.

¹⁶102 U. S. 273.

ing the sale as to show the intention to sell only "the property and franchises of the company."¹⁷

If we contrast these cases with such a case as *Humphrey v. Pegues*,¹⁸ decided in 1872, we can hardly fail to come to the conclusion that, in the opinion of the Supreme Court which had theretofore been expressed, a right of exemption from taxation, whether given to a company or applying to its property, was a privilege and not a property right. In this case the charter of the Northeastern Railroad Company of South Carolina, of date 1855, provided that the

"stock of the Northeastern Railroad Company and the real estate that it now owns, or may hereafter acquire, which is connected with or subservient to the works, authorized in the charter of the said company *shall be and the same is hereby exempted from all taxation.*"

In 1863 an act of the state legislature which amended the charter of the Cheraw and Darlington Railroad Company provided

"that all the powers, rights, and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw and Darlington Railroad Company."

The Supreme Court of the United States held that the right of exemption from taxation was a "privilege" granted by this law to the Cheraw and Darlington Railroad Company and that inasmuch as it was contained in the charter of the company, it was based on a contract whose obligation might not be impaired by subsequent state legislation.

The *Chesapeake and Ohio Case* which has already been considered is also authority for the view that the right of exemption was regarded as a privilege. In that case it was admitted that the Chesapeake and Ohio Railroad Company, the sale of whose property it was held did not include the right of exemption from taxation, had obtained this right because of the fact that the law under which the corporation was formed through a consolidation of two pre-existing corporations provided that it should be vested with "all the rights, privileges, franchises and property which may have been vested in either company prior to the act of consolidation." In the act incorporating one of these companies it was provided that

¹⁷See also *Wilson v. Gaines* (1880) 103 U. S. 417.

¹⁸16 Wall. 244.

"no taxation shall be imposed by the State until the profits of said company shall amount to ten per cent on the capital of the company."

The Supreme Court says:

"That the Chesapeake and Ohio Railroad Company, by virtue of its organization as a corporation under the Act of March 1st, 1866, became entitled to the exemption from taxation secured by § 7 of that act, and that as a matter of contract, is not denied or disputed."

It will be noticed that the *Chesapeake and Ohio Case* held that a right of exemption from taxation was not transferable to a successor corporation although there were words in the law authorizing the sale of the property of the corporation which indicated that the new corporation was "to succeed to all such franchises, rights and privileges" as were possessed by the old corporation. This case thus manifested a tendency upon the part of the court to regard a right of exemption as not even a transferable privilege unless the legislative intention was clear. In later cases, among which may be mentioned *Picard v. East Tennessee, Virginia and Georgia Railroad Company*,¹⁹ decided in 1889; *Wilmington and Weldon Railroad Company v. Alsbrook*,²⁰ decided in 1892; *Keokuk and Western Railroad Company v. Missouri*,²¹ decided in 1894; and *Phoenix Fire and Marine Insurance Company v. Tennessee*,²² decided in 1896, this tendency became quite marked. Finally, in *Rochester Railway Company v. Rochester*,²³ decided in 1907, the court reviews the principal cases on the subject and definitely commits itself to the view that a right of exemption given to one corporation is not transferred to the successor corporation unless the state directs such transfer. The court says:²⁴

"Although the obligations of such a contract are protected by the Federal Constitution from impairment by the State, the contract itself is not property which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the State may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and

¹⁹130 U. S. 637.

²⁰146 U. S. 279.

²¹152 U. S. 301.

²²161 U. S. 174.

²³205 U. S. 236.

²⁴*Ibid.* 247.

he cannot by any form of conveyance transmit the contract or its benefits to a successor."

As late then as 1907 the view of the Supreme Court as to the nature of a tax exemption given by the State and contained in a corporate charter was that it was not property or even a privilege which was capable of assignment or transfer by any act of the grantee. It was held, it is true, in *New Jersey v. Wilson*,²⁵ that such a right of exemption not in a charter but granted to individuals and based upon a consideration ran with the land, which was exempted, in such a way that it enured to the benefit of the subsequent grantee of such land without any positive action upon the part of the state. With the exception of this case, however, practically all the cases which have been decided in the Supreme Court have expressed the belief that a tax exemption based upon a consideration is a contract personal to the grantee which is incapable of transfer or assignment by him without some express State law providing for such transfer. The only case which takes the view that a tax exemption granted for a consideration is "property" is *Duluth and Iron Range Railroad Company v. St. Louis County*. This is not, it has been pointed out, a satisfactory decision.

It is submitted that the attempt made in *Choate v. Trapp* to accord to such an exemption the characteristic of property will tend to introduce confusion into the law. If a right to a tax exemption based upon a consideration or contained in a corporate charter is a property rather than a contract right and is to be regarded as protected by the due process clause of the Fifth and Fourteenth Amendments the question arises whether a legislature which at the time of granting a corporate charter has reserved the right to repeal or amend the charter is precluded from subsequently amending the charter in which such an exemption is contained in such a way as to repeal the exemption. For Congress whose action was declared unconstitutional may repeal exemptions based on contracts since it is not forbidden to impair the obligation of contracts. In other words will a legislature, notwithstanding its reservation of the right to amend or repeal, by repealing an exemption granted under these conditions be depriving such a corporation of its property without due process of law? The Supreme Court of the United States has intimated if not decided that it is

²⁵*Supra*.

"beyond the power of the legislature under the guise of an act amending or repealing a charter, to take away the property of the corporation."²⁶

It was on this theory that *Duluth and Iron Range Railroad Company v. St. Louis County* was decided. This, it will be remembered, held unconstitutional as depriving of property without due process of law, a law of a state which at the same time repealed a repealable exemption but reserved to the state the benefits of a consideration alleged to have been given to the state in return for the exemption repealed.

On the theory that an exemption contained in a corporate charter is not property but a contract whose obligation may be impaired where the power to repeal or amend has been retained, the New York Court of Appeals recently held that the state legislature may, by general law provide, with regard to corporations which are by their charters exempt from taxation, that they shall not hereafter be exempt from a tax on the recording of mortgages which they own where the tax is imposed by law on the recording of all mortgages.²⁷ If this case is right either exemptions from taxation granted in a corporate charter form a less protected class of property than those granted for a more substantial consideration or all exemptions whatever may be the consideration on which they are based are mere contracts which while protected by the contract clause of the Constitution are not property within the meaning of the Fifth and Fourteenth Amendments. The distinction between "contracts" under the Federal Constitution and "property" under the Amendments is a substantial one. In the first place the contract clause does not bind the federal government and in the second place the states which are subject both to the contract clause and to the Fourteenth Amendment will not, if these exemptions are property rather than contracts, be able to provide as was done in the New York case for the repeal of a tax exemption contained in a corporate charter through reserving to themselves the right to repeal or amend corporate charters. Furthermore it is difficult to comprehend why it is necessary to regard tax exemptions, granted for a consideration but not contained in a corporate charter, as property protected by the Fourteenth Amendment unless it is desired to reach such rather extraordinary results as were

²⁶*Bienville Water Supply Co. v. Mobile* (1902) 186 U. S. 212, 222, citing *Sinking Fund Cases* 99 U. S. 700, 720.

²⁷*People v. Gass* (1907) 190 N. Y. 323, following *Tomlinson v. Jessup* (1872) 15 Wall. 454.

reached in the *Duluth and Iron Range Railroad Case*. For all tax exemptions granted by the State for a consideration more substantial than that found in a corporate charter will, if not considered to be property, still be contracts whose obligation may not be impaired by a state law, unless by the state constitution such exemptions are specifically made liable to repeal or amendment. Where they are so subject to repeal or amendment, the attempt upon the part of the courts to regard them as property when they are given for a consideration is really an attempt to evade a prohibition of a state constitution which it is clearly recognized that a state is competent to make. As such an attempt it is incapable of constitutional justification.

The only reason then for considering as property, tax exemptions granted for a consideration is the desire to protect them from repeal upon the part of legislatures which constitutionally have the right of repeal. But it is doubtful if such a purpose is sufficient to justify the court, without citation of cases,²⁸ to introduce into our law a doctrine which tends both to promote confusion and to impose upon the powers of both Congress and the state legislatures a limitation which has not hitherto been supposed to exist.

It may, however, be the case that we need assign only a very narrow effect to this case of *Choate v. Trapp* which at first blush appears fraught with so much that is serious. It is to be noticed that the effect of it was to protect certain Indians, and that the court expressly says that in the government's dealings with the Indians

"the construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than one hundred years and has been applied in tax cases:

"The provision that 'all land shall be non-taxable' naturally indicates that the exemption is attached to the land—only an artificial rule can make it a personal privilege. But if there is any conflict between the natural meaning and the technical construction,—if there were room for doubt, or if there were any question as to whether this was a personal privilege and repealable, or an incident attached to the land itself for a limited period, that doubt, under this rule, must be resolved in favor of the patentee."²⁹

²⁸It is rather remarkable that the *Duluth and Iron Range Railroad Case* is not cited, as it is apparently the only one in point.

²⁹224 U. S. 675-6.

By this method of reasoning, and following *New Jersey v. Wilson*,³⁰ which it will be remembered was also a case arising out of relations with Indians, the court reaches the conclusion that the exemption, though granted only to the original allottee, attached to the land; was therefore property; and was protected by the Fifth Amendment against subsequent repeal by Congress.

While it may be doubted whether the court was justified even by its laudable desire to protect the Indians, in declaring unconstitutional an act of Congress on an entirely new ground the existence of which has up to the present time hardly been even suspected, it may be hoped if not expected that the circumstances in which *Choate v. Trapp* was decided were so peculiar as to cause it to be accorded little weight in the consideration of the questions which have been discussed in this article.

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³⁰*Supra*.